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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No._____

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WILLIAM KENNY STEPHENS,

Petitioner

vs.

STATE OF GEORGIA,

Respondent

---

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered June 2, 1981, rehearing denied June 24, 1981.

QUESTIONS PRESENTED

1. Whether a death sentence based on three statutory aggravating circumstances is valid where two of the three statutory aggravating circumstances are declared invalid and inappropriate to Petitioner's case by the Supreme Court of Georgia, especially in light of the decision by the United States Court of Appeals for the Fifth Circuit in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980).

2. Whether the trial court's charge on malice impermissibly shifted the burden of proof to Petitioner in violation of the rule of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979).

3. Whether the admission into evidence during the sentencing phase of Petitioner's trial, without any instructions by the Trial Court, or prior criminal convictions of Petitioner, even

though authorized by Georgia statute, elevated these non-capital felony convictions to statutory aggravating circumstances.

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## OPINION BELOW

The opinion of the Supreme Court of the State of Georgia is reported in 278 S.E.2d 398 (1980) and is set out in the Appendix hereto, pp. A-1 through A-20.

## JURISDICTION

The judgment of the Supreme Court of the State of Georgia was entered on June 2, 1981. A timely motion for rehearing was denied on June 24, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserting before this Court deprivation of his rights secured by the Constitution of the United States of America.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitutional Provisions

a. Fifth Amendment to the Constitution of the United States of America.

b. Sixth Amendment to the Constitution of the United States of America.

c. Eighth Amendment to the Constitution of the United States of America.

d. Fourteenth Amendment to the Constitution of the United States of America.

2. Statutes

a. Ga. Code Ann. §26-1101. MURDER

> (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.
>
> (b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.
>
> (c) A person convicted of murder shall be punished by death or by imprisonment for life.
> (Acts 1968, pp. 1249, 1276)

b. Ga. Code Ann. §27-2503. PRESENTENCE HEARINGS IN FELONY CASES

> (a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be

in the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(b) In all cases in which the death penalty may be imposed, and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.
(Acts 1974, pp. 352, 357.)

c. Ga. Code Ann. §27-2534.1. MITIGATING AND AGGRAVATING CIRCUMSTANCES; DEATH PENALTY

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense or murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections

employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, or himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed. (Acts 1973, pp. 159, 163)

d. Ga. Code Ann. §27-2537. REVIEW OF DEATH SENTENCES

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court

shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the Court, and to present oral argument to the Court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the Court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods

to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence. (Acts 1973, pp. 159, 165)

## STATEMENT OF THE CASE

This is a petition for writ of certiorari to review the judgment of the Supreme Court of the State of Georgia entered on June 2, 1981, rehearing denied on June 24, 1981, affirming Petitioner's conviction of murder and sentence of death.

Petitioner was arrested and indicted for the murder of a deputy sheriff of Richmond County, Georgia, which occurred on January 24, 1979. Petitioner was indigent and was appointed counsel following his arrest.

Petitioner was tried for the offenses of murder and aggravated assault in the Superior Court of Richmond County, Georgia, from February 12, 1980 through February 16, 1980. At the conclusion of the guilt or innocence phase, the Trial Court charged the jury on Georgia's murder statute, Ga. Code Ann. §26-1101, and charged that "malice shall be implied where no considerable provocation appears and all the circumstances of the killing show an abandoned and malignant heart." (T-1118).[1]

The jury returned a verdict of guilty (T-1132)(R-5)[2], and during the sentencing phase, the Trial Court allowed into evidence, over objection, prior criminal convictions of Petitioner without giving the jury any instructions on the use of these convictions. (T-1156, 1160). The Trial Court also charged, over objection, three statutory aggravating circumstances which the jury considered, those being: (1) "the murder was committed for the purpose of preventing the lawful arrest of the offender" (Ga. Code Ann. §27-2534.1(b)(9); (2) "the offense was committed against a police officer while he was engaged in the performance of his official

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1. References to the Trial Transcript are designated "T-."

2. References to the Record on Appeal are designated "R-."

duties" (Ga. Code Ann. §27-2534.1(b)(8); and (3) "the offense of murder was outrageously and wantonly vile, horrible, and inhuman, in that it involved torture and depravity of mind" (Ga. Code Ann. §27-2534.1(b)(7). (T-1223) After argument on the charge, the Trial Court recharged the jury on Ga. Code Ann. §27-2534.1(b)(7), omitting the word "torture" (T-1232). During their deliberations, the jury returned to the Courtroom to ask the definition of "depravity" (T-1238), to which question the Trial Court replied that it could not elaborate since the charge was complete in itself. (T-1238). Thereafter, the jury returned a sentence of death finding the existence of the three statutory aggravating circumstances charged to it by the Trial Court (T-1239) and fixed the penalty as death (T-1239)(R-212). The Trial Court then sentenced Petitioner to death (T-1241, 1242)(R-213, 214).

Petitioner appealed to the Supreme Court of the State of Georgia, and on June 2, 1981, the Supreme Court of the State of Georgia affirmed the conviction and sentence of death, but reversed two statutory aggravating circumstances found by the jury, those being (1) "the offense of murder was outrageously and wantonly vile, horrible, and inhuman, in that it involved depravity of mind" (Ga. Code Ann. §27-2534.1(b)(7); and (2) "the offense of murder was committed for the purpose of preventing the lawful arrest of the offender" (Ga. Code Ann. §27-2534.1(b)(10).

Petitioner's timely motion for rehearing was denied on June 24, 1981.

## HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

During the guilt or innocence phase of the trial, the Trial Court's charged on malice as follows:

> Members of the Jury, I charge you that a person committs murder when he unlawfully and with malice aforethought, either express or implied causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. Before you would be authorized to find the defendant guilty of the offense of murder, you must find and believe beyond a reasonable doubt that the defendant did with malice aforethought, either express or implied, cause the death of Larry W. Stevens, Sr. (T-1118) (emphasis added)

Petitioner objected to the charge on malice and pointed out to the Court that evidence of provocation did exist and that malice could not be implied. (T-1128, 1129).

During the sentencing phase of the trial, Petitioner objected to the Court's charging that the "offense of murder was committed for the purpose of preventing the lawful arrest of the offender" (T-1227) and that "the offense of murder was outrageously and wantonly vile, horrible, inhuman in that it involved torture and depravity of mind". The District Attorney and the Trial Court agreed there was no torture involved (T-1228, 1231, 1234), and the Trial Court recharged the jury that the "offense of murder was outrageously and wantonly vile, horrible, and inhuman in that it involved depravity of mind" (T-1233), to which recharge Petitioner again objected (T-1231). Petitioner also raised the constitutional objections under the Fifth, Sixth, Eighth, and Fourteenth Amendments on all the statutory aggravating circumstances charged to the Court. (T-1229, 1230).

During the sentencing phase, the State introduced previous convictions of Petitioner for larceny of an automobile (dated August and September, 1964), assault with intent to murder (dated October, 1964), and burglary (dated April, 1971)(T-1160), to which the Petitioner objected (T-1160) basing his objections on the Fifth, Sixth, Eighth, and Fourteenth Amendments which previously had been pointed out to the Court (T-1156).

Petitioner's Amended Motion for New Trial again raised each of the questions presented here (R-219-221).

Petitioner again raised these issues in the Supreme Court of Georgia (See Appendix, pp. 12, 13, 14) in his Enumerations of Errors and Brief.

The Supreme Court of Georgia reversed the first and second statutory aggravating circumstances found by the jury, i.e., that "the offense of murder was outrageously and wantonly vile, horrible, and inhuman, in that it involved depravity of mind," and the "murder was committed for the purpose of preventing the lawful arrest of the offender". (Appendix, p. 17). However, the Supreme Court of Georgia found that the evidence factually supported a "finding beyond a reasonable doubt that the offense was committed against a peace officer while he was engaged in the performance of his official duties. Jackson v. Virginia, 443 U.S. 307 (99 S.Ct. 2781, 61 L.Ed.2d 560) (1979)" (Appendix, p. 17) and affirmed the sentence of death.

In Enumeration of Error 16, Petitioner contended that the Trial Court erred in charging "malice shall be implied where no considerable provocation appears and where all the circumstances show an abandoned and malignant heart." To this, the Supreme Court of Georgia said:

> . . .The defendant contends this as a burden-shifting charge in violation of the constitutional standards set forth in Sandstrom v.

Montana, 442 U.S. 510 (99 S.Ct. 2450, L.Ed.2d 39) (1979).

> This same argument was made in Tucker v. State, 245 Ga. 68 (5) (268 S.E.2d 109) (1980), and this Court ruled as follows: "Inference in the present case does not 'undermine the factfinder's responsibility at trial, based on evidence addressed by the State, to find the ultimate facts beyond a reasonable doubt'. Rather it leaves the trier of fact 'free to credit or reject the inference and does not shift the burden of proof. . .' County Court of Ulster County, New York v. Allen, 442 U.S. 140 (99 S.Ct. 2213, 60 L.Ed. 777) (1979)." There is no merit in this enumeration of error. (Appendix, pp. 12, 13)

In Enumeration of Error 19, Petitioner raised his objections to allowing into evidence prior non-capital convictions. To this, the Supreme Court of Georgia said:

> If the defendant had no prior criminal record, he would certainly want this fact in evidence, and the State should be allowed the same consideration in presenting its case. See, Hughes v. State, 239 Ga. 393 (4) (236 S.E.2d 829)(1977); Davis v. State, 241 Ga. 376 (6) (247 S.E.2d 45) (1978). There is no merit in this enumeration of error. Fair v. State, 245 Ga. 868 (268 S.E.2d 316) (1980). (Appendix, p. 14)

## ARGUMENT

I. PETITIONER'S DEATH SENTENCE IS INVALID BECAUSE TWO OF THE THREE STATUTORY AGGRAVATING CIRCUMSTANCES CHARGED TO AND FOUND BY THE JURY TO EXIST WERE LATER DECLARED INVALID AND INAPPROPRIATE TO PETITIONER'S CASE BY THE SUPREME COURT OF GEORGIA, ESPECIALLY IN VIEW OF STEPHENS V. ZANT, 631 F.2d 397 (5th Cir. 1980).

As this Court has previously recognized:

> . . .the death penalty is qualitatively different from a sentence of imprisonment however long. Death, in its finality, differs more from life imprisonment than a one hundred year prison term differs from one of only a year or two. Because of that qualitative difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991 (1976).

With this basic fact in mind, where two of the three statutory aggravating circumstances charged to and found by the jury to exist have been found invalid and inappropriate to Petitioner's case, his death sentence cannot stand under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

As has been previously noted, the Trial Court charged the jury on the statutory aggravating circumstances that the "offense of murder was outrageously and wantonly vile, horrible, and inhuman in that it involved depravity of mind", that "the murder was committed for the purpose of preventing the lawful arrest of the offender", and it involved the killing of a police officer in the performance of his official duties (T-1223).

At trial, both the District Attorney and the Trial Court agreed with Petitioner that there was no torture in the case (T-1228, 1231, 1234) and the Trial Court recharged the jury that "the offense of murder was outrageously and wantonly vile, horrible, and inhuman in that it involved depravity of mind" (T-1233). The jury later asked the meaning of "depravity of mind"(T-1238), and

the Trial Court replied that the charge was "complete in and of itself." (T-1238).

As to this statutory aggravating circumstance, the Supreme Court of Georgia, even though it ignored Petitioner's argument that this statutory aggravating circumstance should never have been charged in the first place especially where no torture was involved, reversed and stated:

> Appellant argues that the trial court erred in failing to define "depravity of mind" when requested to do so by the jury, citing Godfrey v. Georgia, 446 U.S. 420 (100 S.Ct. 1759, 64 L.Ed.2d 398) (1980). Under the facts and circumstances of this case, we agree. Obviously, the jury was confused as to the definition of depravity of mind, a word of common meaning and understanding. In the cases of Hance v. State, 245 Ga. 856 (268 S.E.2d 339)(1980) and Strickland v. State, 247 Ga. 219 (275 S.E.2d 29)(1981), decided since this case was tried, we defined depravity of mind. The jury should have been instructed in response to their request and not allowed to continue its deliberations with this confusion unresolved. Hance v. State, supra; Harris v. State, 237 Ga. 718 (231 S.E.2d 1)(1976); Lamb v. State, 241 Ga. 10 (243 S.E.2d 59)(1978). The jury should not have been allowed to continue its deliberations with this confusion unresolved. (Appendix, pp. 18, 19)

As to the charge on the statutory aggravating circumstance that "the offense of murder was committed for the purpose of preventing a lawful arrest of the offender", the Supreme Court of Georgia said:

> 22. The State did not prove a technical lawful arrest of the offender beyond a reasonable doubt. (Appendix, p. 19).

Even though the Supreme Court of Georgia reversed two of the three statutory aggravating circumstances found by the jury, they found that:

> . . .the evidence factually supports a finding beyond a reasonable doubt that the offense of murder was committed against a peace officer

> while he was engaged in the performance of his official duties. Jackson v. Virginia, 443 U.S. 307 (99 S.Ct. 2781, 61 L.Ed.2d 560) (1979). (Appendix, p. 17).

and affirmed Petitioner's death sentence stating:

> Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance or in this case, two, does not taint the proceedings so as to invalidate the other aggravating circumstances found and the sentence of death based thereon. Burger v. State, 245 Ga. 458 (265 S.E.2d 796)(1980). (Appendix, p. 18).

The decision of the Supreme Court of Georgia in Petitioner's case is in direct conflict to the recent decision of the United States Court of Appeals for the Fifth Circuit in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980) which held that the death penalty was invalid where one of three statutory aggravating circumstances charged to and found by the jury to exist was later held unconstitutional, even though there were two other statutory aggravating circumstances, either of which by themselves would have been legally sufficient to permit the jury to impose the death penalty and as to both of which there was no uncertainty.

The logic and reasoning of Stephens v. Zant, supra, is very persuasive, especially when we ask the questions: What weight did the jury give to the phrase "depravity of mind"? What weight did they give to the existence of three statutory aggravating circumstances in deciding the sentence of death? What weight did they give to the fact that there were more than one aggravating circumstances involved? Would the jury have sentenced the Petitioner to death had they found that the only aggravating circumstance to exist was the killing of a police officer in the performance of his duties? Did the jury believe Petitioner was preventing a lawful arrest of himself?

In Stephens v. Zant, supra, the Court at 406 said:

The question presented, then is whether the death penalty was invalid under the Constitution because it was imposed when one of the aggravating circumstances as later held to be unconstitutional even though there were two other aggravating circumstances, either of which by itself would be legally sufficient to permit the jury to impose the death penalty and as to both of which there is no uncertainty.

In Stromberg v. California, 283 U.S. 359, 367-68, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931), the Supreme Court held that if the jury has been instructed to consider several grounds for conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside. Accord, Bachellar v. Maryland, 397 U.S. 564, 570-71, 90 S.Ct. 1312, 1315-16, 25 L.Ed.2d 570 (1970); Street v. New York, 394 U.S. 576, 585-88, 89 S.Ct. 1354, 1362-63, 22 L.Ed.2d 572 (1969); Yates v. United States, 354 U.S. 298, 311-12, 77 S.Ct. 1064, 1072-73, 1 L.Ed.2d 1356 (1957). This settled principle of law applies with particular force in cases in which the death penalty has been imposed. Furman v. Georgia 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), held that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner. The Constitution requires that the sentencer's discretion be channeled by clear and objective standards that "make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, 428 U.S. at 303, 96 S.Ct. at 2990 (opinion of Stewart, Powell and Stevens, JJ.).

It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance. The jury had the authority to return a life sentence even if it found statutory aggravating circumstances. It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the decision that the offense was committed by one having a substantial history of serious assaultive criminal convictions, an invalid ground. The presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of petitioner which otherwise would not have been before it. The instruction on the invalid circumstance may have directed

> the jury's attention to those convictions. It cannot be determined with the degree of certainty required in capital cases that the evidence of those convictions, together with the instruction, did not make a critical difference in the jury's decision to impose the death penalty.
>
> [17] We hold that the jury's discretion here was not sufficiently channeled, see Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and that the process in which the death penalty was imposed in this case was not "rationally reviewable." Woodson v. North Carolina, 428 U.S. at 303, 96 S.Ct. at 2990. See also Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393. Petitioner's death sentence therefore cannot stand.

Petitioner respectfully submits that since it is impossible to determine the effect of the existence of these invalid statutory aggravating circumstances on the jury, his death sentence cannot stand under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The Supreme Court of Georgia has begrudgingly recognized that it is easier for a jury to return a sentence of death if multiple grounds exist. In Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980) the defendant had argued that the jury could not impose the death penalty under Ga. Code Ann. §27-2534.1(b)(7) unless they found not only the existence of "aggravated battery" but also "depravity of mind". In response to this contention, the Court at 863 said:

> To have charged "depravity of mind" would have given the jury an additional ground upon which the jury could have found the existence of the statutory aggravating circumstance and therefore would have been detrimental to the Appellant. See Division 3. Appellant cannot complain of a charge which is beneficial to him. (emphasis added)

Since the jury is never required, under any circumstances and regardless of how heinous the crime or incorrigible the

defendant, to sentence a person to death, it certainly cannot be presumed that the existence of one statutory aggravating circumstance, even involving the death of a police officer, would have caused the jury to sentence Petitioner to death. This is especially so when the recent cases of Patterson v. State, 239 Ga. 409, 238 S.E.2d 2 (1977), and Jordon v. State, 247 Ga. 328, 276 S.E.2d 224 (1981) are considered, both of which involved the killing of a police officer and where the death sentence was not imposed.

In Jordon v. State, supra, the jury imposed a life sentence on the defendant even though they found the existence of four statutory aggravating circumstances, those being Ga. Code Ann. §27.2534.1(b)(7), (8), (9), (10). In Patterson v. State, supra, two police officers were killed, one of whom was unarmed, and the defendant received a life sentence.

In summary, Petitioner respectfully contends that since there is no way for the Court to determine what effect the existence of the two invalid statutory aggravating circumstances had on the jury's decision to impose the death sentence on him, his sentence cannot stand.

II. THE TRIAL COURT ERRED IN CHARGING THE JURY THAT "MALICE SHALL BE IMPLIED WHERE NO CONSIDERABLE PROVOCATION APPEARS, AND WHERE ALL THE CIRCUMSTANCES OF THE KILLING SHOW AN ABANDONED AND MALIGNANT HEART" SINCE SUCH A CHARGE REQUIRED THE JURY TO IMPLY MALICE, AND SHIFTED THE BURDEN OF PROOF IN VIOLATION OF THE RULE OF SANDSTROM V. MONTANA, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39(1979).

The Court's charge on malice is taken from the Georgia statute on murder, Ga. Code Ann. §26-1101. Murder in Georgia is committed when a person unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Ga. Code Ann. §26-1101.

Thus, in order to prove murder, the State must show that the defendant did the killing and that he acted with "malice aforethought". If either of these elements is not shown, then a conviction of murder cannot be sustained.

In Petitioner's case, he admitted the act of killing the deputy sheriff, but claimed it was done in self-defense after the deputy had fired at him first, thus denying the intent (malice)

Rather than requiring the jury to find the existence of malice aforethought and the act of killing beyond a reasonable doubt, the Trial Court charged the jury that "malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart" (T-1118). This charge relieved the State of its burden of proof of showing the essential element of the crime beyond a reasonable doubt.

When the jury was instructed that malice "shall be implied," they were directed and commanded to imply malice. This is most crucial in Petitioner's case where there was evidence of considerable provocation and all the circumstances did not show an abandoned and malignant heart.

The word "shall" is defined in Webster's Third New International Dictionary, 1963, at page 2085, as "used to express a

command or exortation. . .used in laws, regulations, or directives to express what is mandatory."

As this court has recognized in County Court of Ulster County, New York v. Allen, 99 S.Ct. 2213, 2216 (1979) that a mandatory presumption must be accepted by the jury even if it is the sole evidence of an offense, and in analyzing the presumption, it is irrelevant there is ample evidence in the record other than the presumption to support a conviction.

Also, in Sandstrom v. Montana, 99 S.Ct. 2450 (1979) the Court held an instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" without being told that this inference may be rebutted, is invalid because a reasonable jury could easily view the instruction as mandatory.

In reaching the decision in Sandstrom v. Montana, supra, the Court reaffirmed its decision in Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), and United States v. United States Gypson, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978) saying at 99 S.Ct. at 2459:

> As in Morissette and United States Gypson, a conclusive presumption in this case would "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime," and would "invade [the] fact-finding function" which in a criminal case the law assigns solely to the jury. The instruction announced to David Sandstrom's jury may very well have had exactly these consequences. Upon finding proof of one element of the crime (causing death) and of facts insufficient to establish the second (the voluntariness and "ordinary consequences" of defendant's actions), Sandstrom's jurors could reasonably have concluded that they were directed to find against defendant on the element of intent. The State was thus not forced to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime. . . charged." 397 U.S. at 364, 90 S.Ct. at 1073, and defendant was deprived of his

constitutional rights as explicated in Winship.

As the Court In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1978) noted at 397 U.S. at 364, 90 S.Ct. at 1073:

> Less there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In summary, the Petitioner respectfully contends that the charge that "malice shall be implied" is a mandatory order for the jury to conclude, imply, and presume an essential element of the offense of murder, thus relieving the State from proving this most essential and critical element beyond a reasonable doubt. A conviction based upon such erroneous charge denies to Petitioner due process under the Fifth and Fourteenth Amendments to the United States Constitution.

III. THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE PRIOR CRIMINAL CONVICTIONS OF PETITIONER WITHOUT GIVING THE JURY ANY PRECAUTIONARY INSTRUCTIONS AS TO THE CONSIDERATION AND USE OF THESE CONVICTIONS, AND THE USE AND CONSIDERATION OF THESE PRIOR CRIMINAL CONVICTIONS ELEVATED THEM TO STATUTORY AGGRAVATING CIRCUMSTANCES.

During the penalty phase of the trial, the State introduced over objection, evidence of prior convictions of Petitioner (T-1152, 1160). The Court did not give precautionary instructions to the jury as to their use of these prior convictions.

Even though the Supreme Court of Georgia has previously held that prior convictions can be admitted during the penalty phase under Ga. Code Ann. §27-2534.1, Davis v. State, 241 Ga. 376, 247 S.E.2d 45 (1978), the introduction of prior criminal convictions in Petitioner's case, without precautionary instructions, elevated those prior convictions to statutory aggravating circumstances. This is especially true since the introduction of the convictions for aggravated assault (1964), larceny of an automobile (1964), and burglary (1971) was done solely for the purpose of predjudicing Petitioner and inflaming the jury against him. The convictions were remote in time and their only function was to predjudice Petitioner and make it easier for the jury to sentence him to death.

The Georgia Death Penalty Statute lists ten aggravating circumstances for which the death penalty may be imposed. While the Georgia Law, Ga. Code Ann. §27.2503, and 2534.1, allows the introduction of prior criminal record of a defendant during the sentencing phase, the introduction and consideration by the jury of these non-statutory aggravating circumstances must be accompanied by instructions from the Trial Court as to their use. Otherwise, there is no way to tell what influence these prior convictions had on the jury's determination and decision to sentence a person to death. In Petitioner's case, to have allowed the jury to consider without instructions evidence of prior

criminal convictions violated the principle enunciated in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner. In Petitioner's case, the jury, by considering his prior criminal convictions without precautionary instructions, was given uncontrolled and unfettered discretion in determining whether or not Petitioner would be sentenced to death.

Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated.

## CONCLUSION

Petitioner respectfully submits that his conviction and sentence of death should be reversed.

Respectfully submitted, this ___ day of August, 1981.

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YOU ARE TO NOTIFY
THE DEFENDANT OF THIS
DECISION WITHIN 3 DAYS.

In The Supreme Court of Georgia

Decided: JUN - 2 1981

36943. STEVENS, a/k/a STEPHENS v. THE STATE.

JORDAN, Chief Justice.

The defendant was indicted on one count of murder and three counts of aggravated assault: the victim in each count being a police officer. He was found guilty on all charges and sentenced to death for the murder and to twenty years on each count of aggravated assault to be served consecutively.

The record establishes that on January 22, 1979, the police stopped the defendant for questioning regarding the burglary of a department store in which several weapons had been taken. It was discovered that he was driving under the influence and without a license, whereupon he was arrested. After being questioned at the police station, the defendant agreed to ask around and find out who was involved in the burglary in exchange for his release upon his own recognizance. As a condition to his release, he was to report back by a certain time. When he did not contact the officer at the appointed time, nor for two days thereafter, the police began to look for him. On January 24, investigator Larry Stevens of the Richmond County Sheriff's Department located the defendant, followed him a short way and then stopped him. When the officer stopped the defendant, he radioed this fact and his location to fellow officers.

After the investigator stopped his automobile, he opened his car door and apparently leaned back to do

something with his radio. The defendant fired into the car through the windshield striking investigator Stevens in the right forearm and rendering his right arm below the elbow useless. The police officer managed to get his gun out and fired wild shots through his automobile at the defendant. The defendant fired a second shot striking the officer in the right side. Then the defendant walked to the rear of the investigator's automobile, turned, raised the weapon up to shoulder height, and fired in a very calm, deliberate manner through the rear window. The round hit the officer in the chest and was almost immediately fatal. The defendant then went to his car and drove off at a high rate of speed. He intended to go to his mother's house, but stopped on the way at a store to purchase more ammunition. When he approached his mother's house, authorities were waiting for him, and a high speed pursuit then occurred. This occurred approximately twenty-five minutes after the murder. Officers finally trapped the defendant in a cul-de-sac, and a gun battle with the police then ensued. The defendant maintained that when investigator Stevens stopped him, he exited his automobile with a loaded rifle in order to show the officer that he had recovered some of the guns from the burglary and that as he approached the officer's car, the officer, for no reason, shot at him at which instance the defendant then opened fire shooting the officer in self-defense.

"Monkey" Warren testified that the defendant and Paul Lewis came to him on the Sunday night before the victim was killed and showed him some guns they wanted to sell him. The defendant showed him a rifle of the same type that killed the victim and when he didn't want to buy it, the defendant shot through the floor and left.

ENUMERATIONS OF ERROR

1. In Enumeration of error 1, the appellant contends the trial court erred in overruling his motion to sever the murder count from the aggravated assault counts for trial. The defendant relies on Dingler v. State, 233 Ga. 462 (211 SE2d 752) (1975) in support of his argument. In Dingler, supra, p. 463, the court held: "The ABA Standards on Joinder of Offenses provides: 'Two or more offenses may be joined in one charge, with each offense stated in a separate count, when the offenses ... (b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.'"

All the present charges against the defendant arise out of a continuous course of conduct and therefore come within the above quoted standard for joinder of offenses, escape being necessarily a part of the crime. See Collier v. State, 244 Ga. 553 (261 SE2d 364) (1979). There is no merit in this enumeration of error. Jarrell v. State, 234 Ga. 410 (216 SE2d 258) (1975).

From the nature of the entire transaction, it would be almost impossible to present to a jury evidence of one of the crimes without also permitting evidence of the other crimes to be introduced, as the murder of the police officer was the probable cause for the chase and the stopping of the defendant which resulted in the shootout. Owens v. State, 233 Ga. 869 (214 SE2d 173) (1975). Cf. Padgett v. State, 239 Ga. 556 (238 SE2d 92) (1977); Hiasman v. State, 242 Ga. 896 (252 SE2d 397) (1979).

2. In Enumerations of error 2 and 6, the appellant contends the trial court erred in overruling defendant's motion for sequestration of the jury panel during individual voir dire and his renewed motion for the same. The defendant argues that presence of peer pressure, when jurors

are questioned in the presence of each other, could result in bias or prejudice, although he cites no incident of actual bias or prejudice.

In Whitlock v. State, 230 Ga. 700(5) (198 SE2d 865) (1973), this court held that the right to individual examination of jurors given by Code Ann. § 59-705, "... does not encompass isolated examination." The court affirmed its holding in Finney v. State, 242 Ga. 582(4) (250 SE2d 388) (1978) and held: "... that whether or not this individual questioning of the jurors is to take place outside of the the presence of the other jurors is one of those matters lying within the sound discretion of the trial court. Cf. Arnold v. State, 236 Ga. 534(6) (224 SE2d 386) (1976)."

The defendant does not show an abuse of discretion or any prejudice resulting from the failure to allow individual examination of the jurors; there is no merit in these enumerations of error. Nesser v. State, 247 Ga. 316 ( SE2d ) (1981); High v. State, 247 Ga. 289 ( SE2d ) (1981).

3. In Enumeration of error 3, the defendant argues that the trial court erred in overruling his motion to quash the indictment which was premised on the indictment's listing of three other names for the defendant under "also known as." The defendant argues that this was done in a deliberate attempt to prejudice the jury into thinking that before them stood, not just a man accused of a serious crime, but a desperado, i.e. one with many aliases. All but one of the listed names were different spellings or abbreviations of the appellant's names.

A motion to quash is not a proper remedy for striking an alias from an indictment. The defendant should have filed a special plea of misnomer avering that he had

never been known by any of the names set out in the indictment. Andrews v. State, 196 Ga. 84, 110 (26 SE2d 263) (1943). Where an accused is known by different names, however, it is lawful for the indictment to identify the accused by such names as aliases. Allen v. State, 231 Ga. 17 (200 SE2d 106) (1973).

In the present case, two of the former convictions introduced at the sentencing phase of the defendant's trial were in the names of two of the aliases listed in the indictment. There is no merit in this enumeration of error.

4. In Enumeration of error 4, the appellant contends the trial court erred in overruling his motion for change of venue. In the present case, there were some four articles about the shooting and two editorials and four letters from the public concerning the death penalty as related to the killing of police officers. All of these appeared within a three-week span after the death of the officer, and defendant's trial was not until one year later. Additionally, there were several news reports on radio and television stations at the time of the occurrence.

Although thirty-four of the forty-six jurors stated that they had either read or heard a news broadcast of the occurrence, none of them thought it would influence their decision in the case.

In Mooney v. State, 243 Ga. 373, 385 (254 SE2d 337) (1979), in a very lengthy analysis of pre-voir dire motions for change of venue, this court reiterated the holding set out in Murphy v. Florida, 421 U.S. 794 (95 SC 2031, 44 LE2d 589) (1974) that a defendant is entitled to a panel of impartial jurors, but that this does not

require that they be totally ignorant of the facts and issues involved. Review of the voir dire reveals that most of the jurors had very little recollection of any articles appearing over a year ago. Most of the prospective jurors answered that they vaguely remembered reading something about a deputy being killed. All of the jurors answered upon careful examination by the court that they were not influenced in any way by listening to recent radio broadcasts. "The test as to whether the pretrial publicity has so prejudiced a case that an accused cannot receive a fair trial is whether the jurors summoned to try the case have formed fixed opinions as to guilt or innocence of the accused from reading such publicity." Dampier v. State, 245 Ga. 427 (265 SE2d 565) (1980). No juror was excused by the court for prejudice arising out of pre-trial publicity. See Messer v. State, supra.

The defendant has failed to show a "pattern of deep and bitter prejudice created by pretrial publicity present throughout the community." Irvin v. Dowd, 366 U.S. 727 (81 SC 1639, 6 LE2d 751) (1960). This enumeration of error is without merit. See Coleman v. State, 237 Ga. 84 (226 SE2d 911) (1976); Collier v. State, 244 Ga. 553 (261 SE2d 364) (1979); Green v. State, 246 Ga. 598 (272 SE2d 475) (1980); Dick v. State, 246 Ga. 697 (273 SE2d 124) (1980).

5. In Enumeration of error 5, the defendant contends the trial court erred in overruling his motion for the appointment of an expert witness to examine the State's evidence. The defendant's only argument on this issue is that the State's expert witnesses, being employees of the State Crime Laboratory, are under the direction of prosecution.

The defendant has not alleged that he was harmed by the failure to appoint an expert witness nor has he shown how his defense would have been aided by such a witness. The appointment of expert witnesses lies within the sound discretion of the trial court and absent a showing of an abuse of that discretion, this court will not interfere. Patterson v. State, 239 Ga. 409(3) (238 SE2d 2) (1977); Dampier v. State, supra. See Messer v. State, supra. There is no merit in this enumeration of error.

6. Defendant, in Enumerations of error 7 and 8, contends that the trial court erred in allowing the widow of the victim, following her testimony at trial, to remain in the courtroom. Both the prosecution and the defense sequestered all witnesses.

After the widow of the victim testified, the district attorney requested that she be allowed to remain in the courtroom. Defense counsel objected; upon questioning by the court, however, defense counsel admitted that his objection was not for the purpose of eliciting future testimony from the witness, but to keep her from being seen by the jury. The trial court allowed her to remain in the courtroom but required her to sit in the area furthest from the jury and out of their direct view.

The trial court is vested with broad discretion in the enforcement of the sequestration rule. Dampier v. State, supra, and cites. The rule of sequestration does not prohibit persons from remaining in the courtroom during the proceedings, but merely gives a right to either party to have the witnesses for the other party examined out of the hearing of each other. Code Ann. § 38-1703. Therefore, the trial court did not abuse its discretion

in allowing the widow of the victim to remain in the courtroom as she was no longer a witness.

The victim's wife, on direct examination by the State, was asked the usual preliminary questions as to marriage, children and employment. The appellant argues that the testimony of the witness was elicited for the sole purpose of playing on the sympathy and prejudice of the jury. We do not agree. The witness identified the coat and shirt of the victim and testified that the victim was right-handed, a crucial part of the State's case. Her testimony was relevant and admissible. Solomon v. State, 247 Ga. 27 ( SE2d ) (1980). The identity and general background of the victim are relevant issues in a trial of one accused of their murder, and the trial court did not err in allowing the widow of the victim to testify.

7. Defendant's ninth and tenth enumerations of error contend the trial court erred in admitting two statements given by defendant. The first statement of the defendant was made to the officer who was transporting him to the Sheriff's office. The defendant told the officer that the victim was a "no good son-of-a-bitch and should have had it happen to him a long time ago." After a hearing, the court found that the officer had not initiated any interrogation of the defendant, but that the incriminating statement was spontaneous and therefore admissible. "The Prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived

of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (86 SC 1602, 16 LE2d 694) (1966). The trial court found the defendant's statement to be voluntary. We must accept this factual determination unless that finding is shown to be clearly erroneous. Pierce v. State, 235 Ga. 237 (219 SE2d 158) (1975). As the statement seemed to be a purely spontaneous remark, the trial court's finding cannot be said to be clearly erroneous.

The second statement was made after being given his Miranda warnings, and defendant acknowledged that he understood these rights. The defendant argues that even though this is true, the statement is inadmissible because his mother had retained an attorney; the attorney had called the jail looking for the defendant, and the jailer informed the attorney that the defendant had not been logged into the jail. There is no evidence that the jailer knew the whereabouts of the defendant who was being interrogated at the Sheriff's office. The attorney then told the jailer to inform the defendant not to make any statements until he had consulted with him. By virtue of these events, the appellant contends that the statement was inadmissible although the interrogating officers had no knowledge of these events.

The rights guaranteed under the Fifth and Sixth Amendments are personal. The defendant having chosen to waive his rights (and there being no misconduct on the part of the investigating officers), the trial court did not err in admitting these statements. Hance v. State, 245 Ga. 856(2) (268 SE2d 339) (1980).

8. In Enumeration of error 11, the defendant contends the trial court erred in failing to give his request to

Charge No. 2. Defendant requested a charge that the aggravated assaults on the three police officers were justified if the officers placed him in reasonable apprehension of immediately receiving a violent injury.

The charge is to be considered as a whole, and where the charge covers the subject matter of the request, it is not error although not in the exact language of the request. Hawes v. State, 240 Ga. 327 (3,8) (240 SE2d 833) (1977); Moses v. State, 245 Ga. 180(2a) (263 SE2d 916) (1980). Looking at the charge as a whole, this general principle of law was covered in the charge on self-defense and need not be repeated again with specific reference to the aggravated assault charges. See Cape v. State, 246 Ga. 520 (273 SE2d 403) (1980); Strickland v. State, 247 Ga. 219 (275 SE2d 29) (1981).

9. In his twelfth enumeration of error, the defendant contends the trial court erred in failing to charge his request to Charge No. 3. Defendant's request was taken from the language of Harrell v. State, 108 Ga. App. 295(2) (132 SE2d 787) (1963), wherein it was held that where "the State solely relies upon the extra-judicial statements of the accused alone to show intent to commit the crime charged and no other evidence is introduced to show such intent, and where the alleged confession of the defendant and his sworn testimony on the trial, considered together, amount to no more than admission of the main fact (that is, the killing of the deceased) with a qualifying exclusion of the necessary ingredient of intent," (here in this case alleged to be self-defense) "and where there is nothing in the proofs submitted by the State which materially contradicted the defendant's account of what occurred, even though the defendant's admission and his testimony

may seem unreasonable, where it is the only explanation the State is able to offer, it is insufficient to sustain a conviction."

This court considered this same contention in Terry v. State, 243 Ga. 11 (1) (252 SE2d 429) (1979) and concluded: "Then we have one rule, Harrell v. State, supra, which appears to say that under the limited circumstances stated there, the defendant's explanation of the homicide must be accepted, and another rule, Jenkins v. State, [241 Ga. 212 (244 SE2d 869) (1978)], which appears to say that the defendant's explanation may be rejected. The difference between these two rules is that the former is applicable where the defendant's statement is consistent with the physical facts shown, but the latter may be relied upon by the State where the defendant's statement is not consistent with and does not explain the other direct and circumstantial evidence. [cites.]"

In the instant case, the defendant's incriminating statements are not consistent with the physical facts. The victim was shot three times with a high-powered rifle, and therefore, his claim of self-defense could be rejected. Jenkins v. State, supra; Smith v. State, 202 Ga. 851 (45 SE2d 267) (1947). Furthermore, a postman testified at trial that he had witnessed the defendant move to the rear of the victim's car and shoot the victim after a period of deliberation. The State's evidence, direct and circumstantial, contradicted the defendant's self-defense theory and authorized the jury to find the defendant guilty of murder. There is no merit in this enumeration of error.

10. In Enumerations of error 13 and 14, the defendant contends the trial court erred in failing to give two

requested charges on involuntary manslaughter. The defendant argues that he used excessive force in the act of self-defense and thus was entitled to a charge on a lawful act performed in an unlawful manner. This argument was raised and rejected in Crawford v. State, 245 Ga. 89 (3) (263 SE2d 131) (1980). There is no merit in these enumerations of error.

11. In Enumeration of error 15, the defendant contends the trial court erred in failing to give his request to charge on simple assault as a lesser included offense of aggravated assault. There is no evidence in this case that would require a charge on the lesser included offense of simple assault. There is no merit in this enumeration of error.

12. In Enumeration of error 16, the defendant contends the trial court erred in charging that malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. The defendant contends this is a burden-shifting charge in violation of the constitutional standards set forth in Sandstrom v. Montana, U. S. (99 SC 2450, LE2d ) (1979).

This same argument was made in Tucker v. State, 245 Ga. 68 (5) (263 SE2d 109) (1980), and this court ruled as follows: "The inference in the present case does not 'undermine the factfinder's responsibility at trial, based on evidence addressed by the State, to find the ultimate

facts beyond a reasonable doubt.' Rather it leaves the trier of fact 'free to credit or reject the inference and does not shift the burden of proof....' County Court of Ulster County, New York v. Allen, U. S. (99 SC 2213, 60 LE2d 777) (1979)." There is no merit in this enumeration of error.

13. The defendant, in his seventeenth enumeration of error, argues that the trial court erred in charging Code Ann. § 26-902(b). This Code section involves self-defense and subsection (b) contains the negative or exception to the self-defense theory.

"It is not usually cause for a new trial that an entire Code section is given. Ford v. State, 232 Ga. 511, 517 (12) (207 SE2d 494) (1974). Accord, Highland v. State, 127 Ga. 613 (1) (194 SE2d 332) (1972). This is so, even though a part of the charge may be inapplicable under the facts in evidence. Highland, supra, at p. 519. Rowles v. State, 143 Ga. App. 553, 557 (239 SE2d 164) (1977) cert. den. Accord, Pippin v. State, 205 Ga. 316 (9), 323 (53 SE2d 482) (1949)." Keller v. State, 245 Ga. 522 (1) (265 SE2d 813) (1980).

14. In Enumeration of error 19, the defendant contends the trial court erred in allowing evidence of prior non-capital convictions at the sentencing phase of his trial. The defendant argues that although this court has consistently held that prior convictions can be admitted at the sentencing phase of a murder trial, these cases should be overruled.

If the defendant had no prior criminal record, he would certainly want this fact in evidence, and the State should be allowed the same consideration in presenting its case. See, Hughes v. State, 239 Ga. 393(4) (236 SE2d 829) (1977); Davis v. State, 241 Ga. 376(6) (247 SE2d 45) (1978). There is no merit in this enumeration of error. Fair v. State, 245 Ga. 868 (268 SE2d 316) (1980).

15. In Enumerations of error 20, 21, 22 and 23, the defendant contends the trial court erred in its charges on aggravating circumstances and in recharging a portion after objection by defendant. The court charged three aggravating circumstances: that the murder was committed to prevent a lawful arrest; that the murder was committed against a police officer engaged in the performance of his duties; and, that the murder was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind.

The defense counsel objected to the use of the word torture, and the trial court recharged omitting this word; therefore, counsel cannot now complain. Nor was the recharge an impermissible expression of the trial court's opinion as to the evidence. Finney v. State, supra. The aggravating circumstances contended by the State form the issue to be tried during the punishment phase of the trial of a capital felony. Code Ann. § 27-2534.1(b) (1-10). The court properly charged the contentions of the State, and there is no merit in these enumerations of error.

16. In Enumerations of error 25 and 27, the defendant contends the trial court expressed an opinion in ruling on an objection to a question asked defendant on cross

examination and in questioning witnesses. "It is not error for the trial judge to refer to the testimony in deciding the objection raised in this case and it was clear that the trial judge was not expressing an opinion, but ruling on the objections made. [Cites]" Wright v. State, 223 Ga. 849 (159 SE2d 76) (1968). See, Tucker v. State, supra. Nor is it error for the trial judge to propound questions to any witness for the purpose of fully developing the truth of the case. This court has examined each instance cited by appellant where the trial court examined a witness, and we find no improper expression of opinion. Thomas v. State, 240 Ga. 393, 400 (242 SE2d 1) (1977); Cape v. State, supra. There is no merit in these enumerations of error.

17. This court and the Supreme Court of the United States have upheld the constitutionality of the Georgia death penalty statute in a number of cases, and the appellant has advanced no new reason for us to reconsider our position. Gregg v. Georgia, 428 U.S. 153 (96 SC 2909, 49 LE2d 859) (1976); Legare v. State, 243 Ga. 744 (257 SE2d 247) (1979) and cites.

18. In Enumerations of error 28, 29, 30, 31, 32 and 33, the defendant contends the trial court erred in failing to charge seven requests to charge at the sentencing phase of defendant's trial. Each request to charge contained some fact or circumstance in evidence and instructed the jury that it could be considered in mitigation.

Similar contentions were presented in Spivey v. State, 241 Ga. 477(2) (246 SE2d 288) (1978), and, after analyzing former cases of this court and the Supreme Court of the United States, this court concluded that "When Georgia

juries are instructed in sentencing to consider all the facts and circumstances which have appeared at both phases of the trial, this necessarily includes any mitigating circumstances which defendant has shown, or argued, or both. The trial court did not err in failing to use the talismanic words, 'mitigating circumstances,' nor did it err in failing to charge specifically that certain evidence was to be deemed mitigating." p. 481. There is no merit in these enumerations of error. Collier v. State, supra; Cape v. State, supra.

19. In Enumerations of error 34, 35, 36, 37, 38 and 39, the defendant contends the trial court erred in excusing six prospective jurors for cause under Witherspoon. Each juror answered unequivocally that he or she was opposed to capital punishment and could not vote for the death penalty regardless of the evidence presented in the case. Although counsel for defendant attempted to rehabilitate these jurors by informing them that they were not required to return a verdict of death, in the final analysis, each said that he or she could not impose a sentence of death. We find no merit in these enumerations of error. See, Ruffin v. State, 243 Ga. 95(3) (252 SE2d 472) (1979); Legare v. State, supra, and Thomas v. State, 245 Ga. 688(2) (266 SE2d 499) (1980).

20. In Enumerations of error 40, 41 and 42, defendant raises general grounds. We have reviewed the entire record in this case and find the evidence sufficient to support the finding of the jury beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979). There is no merit in these enumerations of error.

As required by Georgia Law (1973) p. 159 et. seq., [Code Ann. §27-2537(c)(1-3)] we have reviewed the death sentence in this case. We have considered the aggravating circumstances found by the jury, and the evidence concerning the crime and the defendant. We conclude that the sentence of death in this case was not imposed under the influence of passion, prejudice or any arbitrary factor.

The jury found the following aggravating circumstances to exist beyond a reasonable doubt: (1) §27-2534.1(b)(7) - The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that it involved depravity of mind; (2) §27-2534.1(b)(10) - The murder was committed for the purpose of preventing the lawful arrest of the offender; (3) §27-2534.1(b)(8) - The offense of murder was committed against a peace officer while he was engaged in the performance of his official duties.

Although, for reasons noted below, we reverse the first and second aggravating circumstances found by the jury, we find that the evidence factually supports a finding beyond a reasonable doubt that the offense of murder was committed against a peace officer while he was engaged in the performance of his official duties. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979).

The State introduced evidence that the officer was on duty at the time of the murder, that he was investigating a burglary, and that he was stopping the defendant based upon the defendant's agreement that he would provide information as to the burglary and the arms taken therein as a condition for his release upon his own recognizance.

"Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance or in this case, two, does not taint the proceedings so as to invalidate the other aggravating circumstances found and the sentence of death based thereon." Burger v. State, 245 Ga. 458 (265 SE2d 796) (1980).

Accordingly, we affirm the imposition of the death penalty in the present case.

21. The trial court in its charge to the jury during the sentencing phase of the trial instructed the jury as to Code Ann. § 27-2534.1(b)(7) in the following manner: "The offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind." The jury, after a time of deliberation, requested the court to define "depravity." The trial court answered the jury's question by instructing them that the charge was complete in itself.

Appellant argues that the trial court erred in failing to define "depravity" when requested to do so by the jury, citing Godfrey v. Georgia, 446 U. S. 420 (100 SC 1759, 64 LE2d 398) (1980). Under the facts and circumstances of this case, we agree. Obviously, the jury was confused as to the definition of depravity of mind, a word of common meaning and understanding. In the cases of Hance v. State, 245 Ga. 856 (268 SE2d 339) (1980) and Strickland v. State, 247 Ga. 219 (275 SE2d 29) (1981), decided since this case was tried, we defined depravity of mind. The jury should have been instructed in response to their request and not allowed to continue its deliberations with this confusion unresolved. Hance v. State, supra; Harris v. State, 237 Ga. 718 (230 SE2d 1) (1976); Lamb v. State, 241 Ga. 10 (243 SE2d 59) (1978). The jury should not have

been allowed to continue its deliberations with this confusion unresolved.

22. The State did not prove a technically lawful arrest of the offender beyond a reasonable doubt.

23. The charge of court complied with standards set forth in Spivey v. State, 241 Ga. 477 (246 SE2d 288) (1978); Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1978); and Hawes v. State, 240 Ga. 327 (240 SE2d 833) (1978).

24. Finally, defendant argues the trial court erred in refusing to allow Dr. Phillip Reichel to testify as an expert witness on the subject of the nondeterrent effect of capital punishment on crime. This issue has been raised before and decided adversely to defendant's position. Franklin v. State, 245 Ga. 141 (263 SE2d 666) (1980). See, Collier v. State, supra; Fair v. State, 245 Ga. 868 (268 SE2d 316) (1980).

The murder was an execution style slaying of a police officer engaged in the performance of his official duties. The fatal shot was deliberate and inflicted only after the officer was lying helplessly in his automobile, seriously wounded. In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed.

We find the following similar cases listed in the appendix support the affirmance of the death penalty. Defendant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant.

The twelve cases in which the death penalty was imposed supports the death penalty in the instant case. All of these cases except Jones (it involved the killing

of a security guard) involved the deliberate killing of a police officer thus showing a jury's willingness to give the death penalty under these circumstances.

Judgment affirmed. All the Justices concur.

APPENDIX

1. Johnson v. State, 226 Ga. 378 (174 SE2d 902) (1970)
2. Callahan v. State, 229 Ga. 737 (194 SE2d 431) (1971)
3. Whitlock v. State, 230 Ga. 700 (198 SE2d 865) (1971)
4. Bennett v. State, 231 Ga. 458 (202 SE2d 99) (1973)
5. Ross v. State, 233 Ga. 361 (211 SE2d 356) (1974)
6. Spencer v. State, 236 Ga. 697 (224 SE2d 910) (1976)
7. Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1977)
8. Willis v. State, 243 Ga. 185 (253 SE2d 70) (1979)
9. Jones v. State, 243 Ga. 820 (256 SE2d 907) (1979)
10. Collier v. State, 244 Ga. 553 (261 SE2d 364) (1979)
11. Lewis v. State, 246 Ga. 101 (268 SE2d 915) (1980)
12. McClesky v. State, 245 Ga. 108 (263 SE2d 146) (1980)

NO. 81-5312

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM KENNY STEPHENS,

Petitioner,

V.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

# BRIEF IN OPPOSITION FOR THE RESPONDENT

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81-5312

## QUESTIONS PRESENTED

1.

Whether one statutory aggravating circumstance which has been established beyond a reasonable doubt and which has been upheld on appeal, is sufficient to support a death penalty when two statutory aggravating circumstances found by the jury were reversed on appeal?

2.

Whether the trial court's charge to the jury on implied malice was an unconstitutional shift of the burden of proof?

3.

Whether the Petitioner's prior criminal record was improperly submitted to the jury as a statutory aggravating circumstance.

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| Franklin v. State, 245 Ga. 141, 263 S.E.2d 666 (1980) . . . . . | 10 |
| Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979), cert. denied 445 U.S. 938 (1980) . . . . . | 5 |
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NO. 81-5312

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM KENNY STEPHENS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

# BRIEF IN OPPOSITION FOR THE RESPONDENT

## PART ONE

## STATEMENT OF THE CASE

Petitioner, William Kenny Stephens, was indicted by the Superior Court of Richmond County, Georgia on January 30, 1979. Petitioner was charged with three counts of aggravated assault and the murder of Larry D. Stevens, Jr., an officer with the Richmond County Sheriff's Department. (R. 3).

Petitioner was tried on February 12-16, 1980 in the Superior Court of Richmond County. The jury found the Petitioner guilty on all counts of the indictment and recommended the death penalty based on the finding of three statutory aggravating circumstances beyond a

reasonable doubt. (R. 212, 213). Petitioner subsequently filed an appeal with the Georgia Supreme Court. (R. 1). The conviction was affirmed on June 2, 1981. Stephens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981). Petitioner filed a Motion for Rehearing in the Georgia Supreme Court which was denied on June 24, 1981. On August 22, 1981 Petitioner filed a Petition for Writ of Certiorari in this Court.

The evidence at trial showed that on January 22, 1979, Petitioner was stopped by Investigators Tom Perry and Larry Stevens of the Richmond County Sheriff's Department and arrested for driving under the influence of alcohol and driving without a license. (T. 648). Petitioner was released upon his own recognizance after he agreed to report back to the officers and to supply them with information about weapons recently stolen in a department store burglary. (T. 624, 654). When Petitioner failed to report to the officers as had been agreed, the officers began to look for him. (T. 625). On January 24, 1979, Investigator Stevens located Petitioner driving in his car and stopped him. (T. 631).

It was later determined that Investigator Stevens had been shot three times with a high powered rifle by Petitioner at close range. The only eyewitness to the shooting was a postman who was making rounds at the time of the shooting. He saw the final and fatal shot, which was fired by Petitioner, through the rear windshield of Investigator Steven's car striking him in the chest and severing both large arteries of his heart. (T. 924).

After killing Investigator Stevens, Petitioner quickly drove away and went by a hardware store, where he purchased

more ammunition. (T. 692). Shortly afterwards, he was spotted by patrolmen and a high speed chase ensued. (T. 695-696). He was stopped on a dead-end cul de sac and, after a gun battle with three deputy sheriff officers, was arrested. (T. 696, 704, 695-967).

Further facts will be developed as necessary for a more thorough illumination of the issues raised in this Petition for Writ of Certiorari.

## REASONS FOR NOT GRANTING THE WRIT

### I. A DEATH PENALTY IMPOSED ON THE BASIS OF A STATUTORY AGGRAVATING CIRCUMSTANCE ESTABLISHED BEYOND A REASONABLE DOUBT SHOULD BE UPHELD EVEN THOUGH OTHER STATUTORY AGGRAVATING CIRCUMSTANCES WERE REVERSED ON APPEAL.

Ga. Code Ann. § 27-2534.1 provides that a finding of any one or more of certain statutorily enumerated statutory aggravating circumstances shall be sufficient to enable a jury to impose the death penalty. The statutory aggravating circumstances are set forth in Ga. Code Ann. § 27-2534.1(b)(1)-(10). Pursuant to said Section, Petitioner was sentenced to death after the jury found beyond a reasonable doubt that (1) the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind; (2) the murder was committed for the purpose of preventing the lawful arrest of the offender; and (3) the murder was committed against a peace officer while he was engaged in the performance of his official duties. Ga. Code Ann. § 27-2534.1(b)(7), (10), and (8).

On appeal, the Georgia Supreme Court reversed the first and second statutory aggravating circumstances above as found by the jury but upheld the third statutory aggravating circumstance, finding that, "the evidence factually supports a finding beyond a reasonable doubt that the offense of murder was committed against a peace officer while he was engaged in the performance of his official duties." Stevens, Id. at 708. Clearly, a jury is able to reach such a conclusion based on a factual determination separate and

distinct from its findings as to the prior two statutory aggravating circumstances.

After upholding the third aggravating circumstance, the Georgia Supreme Court affirmed the imposition of the death penalty. This decision is in accordance with well-settled Georgia law that even if the finding of one or more aggravating circumstances must be set aside, the death penalty will be upheld if there still exists a single aggravating circumstance. Burger v. State, 245 Ga. 458, 460-461, 265 S.E.2d 797 (1980), cert. denied 446 U.S. 988 (1980); Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979), cert. denied 445 U.S. 938 (1980).

This Court has consistently recognized the Georgia law on this issue and has recently denied numerous Petitions for Writs of Certiorari from the Georgia Supreme Court. Hamilton v. State, 246 Ga. 264 n. 1, 271 S.E.2d 173 (1980), cert. denied ___ U.S. ___ (1981); Brooks v. State, 246 Ga. 262, 263, 271 S.E.2d 172 (1980), cert. denied ___ U.S. ___ (1981); Collins v. State, 246 Ga. 261, 262, 271 S.E.2d 352 (1980), cert. denied ___ U.S. ___ (1981).

In denying certiorari in an additional Georgia death case raising the same issue, Mr. Justice Stevens stated as follows:

> The Georgia Supreme Court . . . decided to adhere to its prior position that a death penalty imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, will not be set aside simply because one of

> these aggravating circumstances is vulnerable . . . The Georgia Supreme Court's position is clear, and . . . I consider it consistent with this Court's decisions." Westbrook v. Balkcom, ___ U.S. ___ 101 S.Ct. 541, 543, 66 L.Ed.2d 298 (1980) (J. Stevens concurring).

Georgia's death penalty statute also was upheld in Gregg v. Georgia, 428 U.S. 153 (1976). This Court upheld the death penalty in Gregg even though the jury had been permitted under Georgia law to impose a death penalty for armed robbery. Id. at 161-62. The Georgia Supreme Court had ruled that the death penalty in the case of armed robbery was disproportionate to the crime committed. Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974); yet the fact that the jury considered and imposed the death penalty for armed robbery did not require that the death penalty for murder be vacated.

Petitioner argues that this Court's long line of reasoning and agreement with the Georgia Supreme Court's position be disregarded. Petitioner relies solely upon Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), a recent decision of the Fifth Circuit Court of Appeals in regard to which a Petition for Writ of Certiorari recently has been filed with this Court by the State of Georgia. In that case, the Fifth Circuit Court of Appeals determined that the death penalty could not be imposed when one aggravating circumstance was held to be unconstitutional, even though two other valid aggravating circumstances were found to exist.

It is clear that the Fifth Circuit Court of Appeals reliance in Stephens upon the authority of Stromberg v. California, 283 U.S. 359 (1931); accord, Bachellar v. Maryland, 397 U.S. 564 (1970); Street v. New York, 394 U.S. 576 (1969); Yates v. United States, 354 U.S. 298 (1957), was misplaced. In Stromberg v. California, supra, at 367-68, this Court noted that where there was a general verdict of guilty which could have rested on all or any one of three grounds, and one of the three grounds subsequently was determined to be unconstitutional, it was impossible to tell on which ground the verdict had rested, and therefore the conviction had to be set aside. Bachellar v. Maryland, supra; Street v. New York, supra and Yates v. United States, supra, upon which the Fifth Circuit Court of Appeals also relied, all involved general verdicts of guilty, each of which could have been based on an unconstitutional ground. In Stephens, however, the penalty verdict was not a general verdict, and the jury found, in addition to the unconstitutional aggravating circumstance, two valid aggravating circumstances, each of which by itself would be legally sufficient to permit the jury to impose the death penalty. Nevertheless, the Fifth Circuit Court of Appeals placed their reliance on Stromberg, supra, and reached a decision in direct conflict with well-settled law of the Georgia Supreme Court as well as with this Court's actions in denying similar Petitions for Writ of Certiorari from the Georgia Supreme Court.

The Respondent has shown that the holding of the Supreme Court of Georgia is consistent with the prevailing authority established by this Court and that the reliance of the Fifth Circuit Court of Appeals on Stromberg and other similar cases is misplaced. Therefore, Respondent respectfully submits that this Petition for Writ of Certiorari should be denied.

## II. THE DECISION BY THE GEORGIA SUPREME COURT THAT THE IMPLIED MALICE CHARGE TO THE JURY WAS NOT AN UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF COMPLIES WITH THE HOLDINGS OF THIS COURT.

At the trial level, Petitioner attacked the trial court's challenge regarding implied malice. The same challenge was set forth by Petitioner in the Georgia Supreme Court. The Supreme Court held that there was no error in the trial court's charge, citing previous Georgia decisions upholding charges containing identical language. Petitioner now challenges the holding of the Georgia Supreme Court.

In the lower courts and in this Court, Petitioner has attempted to extract a small portion of the jury charge to substantiate a claim that the charge was an impermissible shift of the burden of proof. It has long been the rule, however, that the charge to the jury must be viewed as a whole and not taken as a single instruction in artificial isolation. Cupp v. Naughten, 414 U.S. 141, 147 (1973). Thus, to properly determine the issue presented by the present Petition, this Court should consider more than the single sentence Petitioner has extracted from the charge to the jury.

The charge which Petitioner now challenges is found in Ga. Code Ann. § 26-1101 and reads as follows: "Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart." (T. 1118).

A closer examination of the charge reveals that the challenged portion, when read with the remainder of the charge, clearly does not shift the burden of proof to the Petitioner. The trial court, prior to reading the challenged charge, initially charged that the defendant had plead not guilty and that:

> [t]he defendant enters into the trial of this case with the presumption of innocence in his favor, and that presumption remains with him throughout the trial and until his guilt is established by the evidence beyond all reasonable doubt. The burden is on the State to prove every material allegation in this writ of indictment against this defendant to a moral and reasonable certainty beyond all reasonable doubt. (T. 1111).

At a later point in the charge, the trial court again charged that, "[t]he burden is on the State of proving [sic] beyond a reasonable doubt that the crime, if there was a crime, or crimes were committed by the defendant in Richmond County, Georgia." (T. 1115).

The Court then proceeded to charge on the necessity of criminal intent in a criminal prosecution. The trial court charged as follows:

> I further charge you that a person shall not be presumed to act with criminal intention, but the triers of the facts may find such intention upon consideration of the words, conduct, demeanor, and all other circumstances

> connected with the acts for which the accused has been prosecuted. The burden has always, it has always rested, and continues to rest upon the State to prove the act alleged to be criminal is in fact a criminal act beyond a reasonable doubt. (T. 1119).

This charge indicates clearly that the trial court carefully instructed the jury that criminal intent shall not be presumed and that the burden is on the State to prove the existence of criminal intent.

Petitioner alleges that the inclusion of the word "shall" in the implied malice charge mandates a finding of malice. However, it is clear that no presumption of malice is created merely by setting forth the definition of malice in the trial court's charge to the jury. In Franklin v. State, 245 Ga. 141, 263 S.E.2d 666 (1980), the Georgia Supreme Court considered the indentical implied malice charge and held:

> This charge on implied malice is definitional, i.e., it is in effect a statement that one definition of malice murder is an "implied malice murder" which is murder committed where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. Whenever a definition is given in charge, the effect is superficially like that of a conclusion in that once the jury finds all the elements of the definition

> beyond a reasonable doubt, they have necessarily found the defined term. However, a definition differs from a presumption in that there can be no illegality as to the definition because it establishes the elements required to be proved whereas a presumption establishes a presumptive equivalency, which may be artificial or fictious, with the jury being authorized or required to find the one from the other. Id. at 155-156.

Thus, the challenged charge, as a definition, merely permits the trier of fact to accept or reject the implication of implied malice based upon an application of the particular facts to the definition and does not shift the burden of proof. See County Court of Ulster County, New York v. Allen, 99 S.Ct. 2213 (1979).

The implied malice charge as given to the jury is not one that could have been interpreted by reasonable jurors as either conclusive or as mandating a shift of the burden of proof to the defendant. See Sandstrom v. Montana, 99 S.Ct. 2450 (1979). Malice is not to be presumed at all but is merely to be implied from facts that the State must prove beyond a reasonable doubt.

Respondent has shown that the Georgia Supreme Court properly concluded that the implied malice charge was not an unconstitutional shift of the burden of proof. Therefore, Respondent respectfully submits that this Petition for Writ of Certiorari should be denied.

## III. THE PRIOR CRIMINAL CONVICTIONS OF PETITIONER WERE PROPERLY SUBMITTED TO THE JURY, AND THEY WERE NOT ELEVATED TO STATUTORY AGGRAVATING CIRCUMSTANCES.

Petitioner argues that the introduction of prior criminal convictions, without accompanying precautionary instructions, elevated the prior convictions to statutory aggravating circumstances.

Ga. Code Ann. § 27-2503 specifically allows the jury to consider "additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas."

Ga. Code Ann. § 27-2534.1(b) provides that the judge "shall include in his instructions to the jury for it to consider any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances . . .".

The Georgia Supreme Court in Davis v. State, 241 Ga. 376, 247 S.E.2d 45 (1978) addressed this issue and held that prior non-capital felonies are admissible as aggravating circumstances under Ga. Code Ann. § 27-2534.1, but that they cannot be used as statutory aggravating circumstances to authorize the imposition of the death penalty.

Allowing the jury to hear evidence of prior non-capital felony convictions does not elevate those convictions to a statutory aggravating circumstance as is alleged by Petitioner.

Evidence of the prior non-capital convictions merely gives the jury the information needed for them to weigh all the aspects of the defendant's character and record in accordance with the intent of Ga. Code Ann. §§ 27-2503 and 27-2534.1(b).

Nowhere in the trial court's charge to the jury did the judge refer to the Petitioner's prior convictions as a statutory aggravating circumstance. At the beginning of the presentence hearing the judge stated as follows:

> In this presentence hearing, counsel for both sides will have the right to present to the jury additional evidence in extenuation, in mitigation, and/or in aggravation as to punishment including the record of any prior criminal convictions and the pleas of guilty and pleas of nolo contendere of the defendant, or the absence of any such prior convictions or pleas. (T. 1159).

At the close of the presentation of the evidence the judge charged the jury on three statutory aggravating circumstances (T. 1223). He did not mention the evidence of Petitioner's prior criminal convictions nor did he refer to them as one of the three statutory aggravating circumstances that must be proven beyond a reasonable doubt. Thus, the jury was told in the charge exactly which three statutory aggravating circumstances were to be considered by them; the Petitioner's prior criminal record was not included in the charge.

The admission into evidence of Petitioner's prior criminal record was consistent with Georgia statutory and

case law, and thus the Georgia Supreme Court did not err in its review of this issue. Respondent respectfully submits that this Petition for Writ of Certiorari should be denied.

## CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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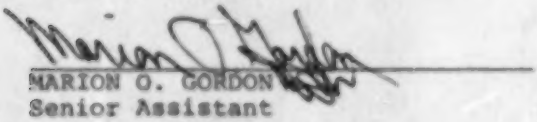

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## CERTIFICATE OF SERVICE

I, John C. Walden, a member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for the Respondent in Opposition by depositing three copies of same in the United States mail, with proper address and adequate postage to:

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This 28th day of September, 1981.

JOHN C. WALDEN